

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
*
CSC, LTD., *
* CASE NUMBER 01-40096
Debtor. *
*

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ANDREW W. SUHAR, TRUSTEE, *
et al., *
*
Plaintiffs, *
*
vs. * ADVERSARY NUMBER 01-4080
*
HONDA TRADING AMERICA, *
*
Defendant. *
*

ORDER REGARDING DEFENDANT'S MOTION TO STRIKE

The matter before the Court is the Motion to Strike Declaration of Joseph A. Rooney (the "Rooney Declaration"), which was filed by Defendant, Honda Trading America Corp. ("Defendant"). The Rooney Declaration was filed in support of the Motion for Summary Judgment filed by Plaintiffs, Andrew W. Suhar, Chapter 7 Trustee (the "Trustee"), and Wachovia Bank, N.A. ("Wachovia") (collectively, "Plaintiffs").

I. FACTS

In support of Defendant's Motion for Partial Summary Judgment and opposition to Plaintiffs' Motion for Summary Judgment,

Defendant filed a Motion to Strike the Rooney Declaration. Mr. Rooney was a consultant for Jay Alix, a turnaround firm hired by Debtor, CSC, Ltd. ("Debtor"), when Debtor filed for bankruptcy in 2001. Mr. Rooney supervised the shutdown of Debtor's steel plant, and claims to be familiar with Debtor's operations and business.

Mr. Rooney's declaration provides, in relevant part:

1. I am a civil engineer with a Bachelor of Arts degree from Columbia College, a Bachelor of Science in Civil Engineering from the School of Engineering of Columbia University and a Masters degree in Computer Science from West Chester State University. I have over 40 years experience in the planning, design and construction of steel-making facilities, both in ore-based and scrap-based production. I also have experience in other metals processing facilities such as foundries, forge shops and metals processing warehouses.

2. In the spring and summer of 2001, I was a consultant for Jay Alix

3. I have examined certain documents relating to the business dealings between CSC, Ltd. ("CSC") and Honda Trading America ("HTA") and, based upon these documents, my industry experience, and my familiarity with CSC's operations, I can offer the following testimony concerning those transactions.

4. The documents I reviewed include the following:

* * *

These documents are attached to my Declaration and reflect some transactions between the parties in December 2000, the month before the bankruptcy filing.

5. CSC's steel processing was done in manufacturing units known as "heats." A heat is a processing cycle represented by charging

an electric furnace with scrap. Individual heats are assigned a number and examples of heat numbers are found on the above Partial Product Invoices.

6. The CSC invoices to HTA which I reviewed covered six heats and, based upon the use of CSC's 85-ton furnaces, the output sold to HTA covered as little as 5% and as much as 60% of any given heat. Thus, from the documents made available to me, there were no heats exclusively dedicated to Honda, and any scrap used in those heats generated product for Honda as well as other customers of CSC. Thus, there is no way to characterize this production as a closed recycle circuit or closed loop, as there is no segregation or dedication of scrap to particular heat production for HTA.

* * *

10. I state that the foregoing declarations are true and correct under the penalty of per-jury.¹

Dated: November 13, 2003

JOSEPH A. ROONEY

Defendant moves the Court to strike the Rooney Declaration on the grounds that it is not based on personal knowledge and contains inadmissible hearsay. Plaintiff asserts that Mr. Rooney's statements are based upon his experience supervising the orderly shutdown of the CSC plant and from his review of various invoices

¹Defendant also moves the Court to strike this Declaration pursuant to 28 U.S.C. § 1746 because Defendant claims the Declaration is not made under penalty of perjury. However, Plaintiffs filed a Response to Defendant's Motion to Strike Declaration of Joseph A. Rooney and for Leave to Resubmit a Corrected Declaration (Doc. # 39), to which was attached the Declaration that included paragraph 10. To the extent necessary, this Court grants Plaintiffs such leave and accepts the corrected Declaration, as filed. Thus, Defendant's Motion to Strike cannot be granted on this basis.

and receipts from the sale of scrap and specialty bar quality steel. Thus, Plaintiff argues that the Rooney Declaration is based on personal knowledge.

II. ANALYSIS

Federal Rule of Civil Procedure 56(e), made applicable in adversary proceedings through Federal Rule of Bankruptcy Procedure 7056(e), provides, in relevant part: "(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein" Thus, an affidavit must be based on personal knowledge in order to be considered on summary judgment. Moreover, an affidavit must contain admissible evidence and cannot be based on hearsay. See *Sperle v. Mich. Dep't of Corr.*, 297 F.3d 483, 495 (6th Cir. 2002). Accordingly, the Court must determine if Mr. Rooney's affidavit is based on personal knowledge or inadmissible hearsay.

Rule 803(6) of the Federal Rules of Evidence provides an exception to the hearsay rule for business records. Rule 803(6) provides:

(6) **Records of Regularly Conducted Activity.**

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if

kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

According to the Sixth Circuit Court of Appeals, a business record must satisfy four requirements in order to be admissible under Rule 803(6):

(1) it must have been made in the course of a regularly conducted business activity; (2) it must have been kept in the regular course of that business; (3) the regular practice of that business must have been to have made the memorandum; and (4) the memorandum must have been made by a person with knowledge of the transaction or from information transmitted by a person with knowledge.

United States v. Jenkins, 345 F.3d 928, 935 (6th Cir. 2003) (quotation omitted).

The documents reviewed by Mr. Rooney were made in the regular course of Debtor's business, and it was the regular practice of Debtor's business to make and retain such records. The documents, on their face, fall under the business records exception to the hearsay rule. Accordingly, the Rooney Declaration is not

based on inadmissible hearsay, but upon business records that are admissible.

The Rooney Declaration is also admissible as the testimony of an expert witness. Rule 702 of the Federal Rules of Evidence provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Mr. Rooney's educational background and his experience as a consultant for Jay Alix qualifies him as an expert for purposes of Rule 702, and the Rooney Declaration is based upon his review of Debtor's business records. The Rooney Declaration is not the product of unreliable methods; rather, Mr. Rooney merely reviewed Debtor's business records to determine whether the scrap steel sold by Defendant to Debtor was exclusively used in the production of specialty bar quality steel sold to Defendant. Since expert testimony does not have to be based on personal knowledge, the Rooney Declaration is admissible even if the Court had found that Mr. Rooney lacked personal knowledge of Debtor's transactions with Defendant.

Defendant's Motion to Strike is hereby overruled because (1) the Rooney Declaration is based upon Debtor's business records and (2) it is admissible as the testimony of an expert witness.

IT IS SO ORDERED.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was placed in the United States Mail this _____ day of December, 2004, addressed to:

ANDREW W. SUHAR, ESQ., 1101 Metropolitan Tower,
P. O. Box 1497, Youngstown, OH 44501.

BRUCE R. SCHRADER, II, ESQ., 222 S. Main
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JAMES W. EHRMAN, ESQ. and REBECCA A. KUCERA,
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JOANNA M. ARMSTRONG